United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1417

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-1417

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

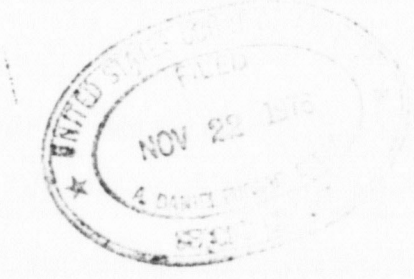
v.

FRANK KINSLER

DEFENDANT-APPELLANT

PETITIONER'S APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLANT



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STATUTES CITED

TITLE 18, UNITED STATES CODE

Section 2518(1)(c):

Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

Section 2518(3)(c):

Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting,

if the judge determines on the basis of the facts submitted by the applicant that --

* * * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

Section 2518(8)(d):

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of --

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

Section 2518(10)(a):

Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that --

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or

oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

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PLAINTIFF-APPELLEE

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF CASE

Defendant, Frank Kinsler, was charged in a two-count indictment, in the first count with violating Title 18, United States Code, Sections 2 and 1955, and in the second count with conspiring to violate Title 18, United States Code, Section 1955. On June 24, 1974, the defendant entered a plea of not guilty. The defendant subsequently moved to dismiss and to suppress the wiretap evidence secured by agents of the Federal Bureau of Investigation. In a decision dated February 17, 1976, United States District Court Judge Robert C. Zampano denied the motion to dismiss and the motion to suppress the wiretap evidence. (App. 31)

Defendant Kinsler then requested leave to change his plea, which was granted, on July 12, 1976. On the same day defendant Kinsler pled guilty to Count One, on the condition that he be granted leave to appeal all questions of law decided by Judge Zampano in his ruling on the Motion to Dismiss.

On September 13, 1976 defendant Kinsler was sentenced on Count One to one year imprisonment, suspended immediately, and placed on probation for four years. Count Two was dismissed on oral motion of the United States Attorney. On

the same day defendant Kinsler filed a Notice of Appeal and brought this present appeal proceeding to obtain review of two legal questions decided by Judge Zampano in his ruling to deny the Motion to Suppress.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial judge failed to comply with 18 U.S.C. §2518(3)(c) because the affidavit supporting the application for wiretap was defective in failing to present a "full and complete statement" of other investigative procedures as is required by 18 U.S.C. §2518(1)(c).

II. Whether it is reversible error for the trial judge to deny the motion to suppress despite the fact that defendant Kinsler never received inventory notice of the interception as is required by 18 U.S.C. §2518(8)(d).

ARGUMENT

I. INTRODUCTION

The historic concern of the judiciary for the potential abuses inherent in wiretapping need not be recounted here. It should, however, be noted that this concern is manifested in the numerous safeguards set forth in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520. The statute calls for certain procedures that must be followed before a wiretap will be considered legal, a precondition for use of the fruits of the wiretap at trial. The interception of wire communications at issue here did not comply with those procedures in two respects and therefore must be suppressed.

First, the application and order for interception of wire communications failed to conform to the requirements of §2518(1)(c) and (3)(c), cited supra at iv. The affidavit of Special Agent Connolly in support of the application for the wiretap did not contain the necessary "full and complete statement" regarding other investigative techniques. Consequently, the judge passing on such application could not have determined "on the basis of the facts submitted by the applicant" that other investigative techniques would have been

futile, impractical or dangerous.

Second, the Government failed to allow the presiding judge to exercise his discretion under 18 U.S.C. §2518(8)(d), set forth supra at v. Defendant Kinsler was not mentioned in the wiretap application or order. (App. 50) Nor, upon disclosure of the relevant documents by the Government, was his identity made known to the presiding judge during or after the wiretap surveillance. As a result, there was no service of notice upon Defendant Kinsler pursuant to 18 U.S.C. §2518(8)(d). It appears from the record that this defendant's identity was never made known to the presiding judge although he ordered the service of notice upon the persons named in the application and order. The Government's failure to bring the defendant's existence to his attention precluded the presiding judge from properly exercising his discretion under the statute. In so doing, the Government violated the rights of the defendant, both statutory and constitutional.

The failure to conform with the statutory mandate in these two respects requires suppression of the intercepted communication because these procedural requirements "directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." United States v. Giordano, 416 U.S.

505, 527. The statute specifically anticipated and provided for this result: upon proper motion, communications "unlawfully intercepted" are subject to suppression. 18 U.S.C. §2510(10)(a).

II. THE INTERCEPTED COMMUNICATIONS SHOULD BE SUPPRESSED BECAUSE THE GOVERNMENT FAILED TO COMPLY WITH THE REQUIREMENTS OF 18 U.S.C. §2518(1)(c) AND (3)(c).

In support of the application for an order authorizing the interception of wire and oral communications which resulted in the interceptions here complained of, Special Agent of the Federal Bureau of Investigation Raymond Connolly submitted an admittedly lengthy affidavit. If length were the criterion required by §2518(1)(c) appellant would be unable to fault the affidavit. The statute, however, requires "a full and complete statement" as to "[1] whether or not other investigative procedures have been tried and failed, or [2] why they reasonably appear unlikely to succeed if tried or [3] to be too dangerous." 18 U.S.C. §2518(1)(c). A careful reading of the affidavit reveals that it does not adequately address the required topics and thus does not conform with the statutory requirements.

Paragraph 5 begins the section of the affidavit headed "Facts and Circumstances" and appears to be intended to meet the §2518(1)(c) requirements. It describes in detail the typical numbers operation, but does not relate such operations

to the defendants or attempt to justify a wiretap.

Paragraph 6 sets forth much information that had been received from informants to the effect that Valeriano and other defendants were involved in a numbers operation. In addition, it describes observations made by police officers. Paragraphs 7 and 8 set forth facts regarding the telephone numbers of some named defendants and the frequency of telephone calls made between the named phones. Information from informants and police records is also stated. Paragraph 9 was apparently omitted, and Paragraph 10 states that raids and searches usually are not successful, gamblers are usually unwilling to testify, and that the informants have refused to testify. Finally, Paragraph 11 states in a conclusionary fashion that all normal avenues of investigation are foreclosed or unlikely to succeed; Paragraph 12 disclaims knowledge of any other intercept application, and Paragraph 13 alleges a conspiracy among the defendants.

The foregoing undeniably sets forth much information to suggest that the defendants were indeed involved in violations of 18 U.S.C. 1955. It is, however, respectfully submitted that it completely fails to satisfy the statutory requirements of 18 U.S.C. §2518(1)(c), which in turn makes compliance with 18 U.S.C. §2518(3)(c) impossible. The statutory scheme carefully distinguishes between the showing of

probable cause required by §2518(1)(b) and (3)(b) and the provision a full and complete statement in the affidavit; both requirements must be met before an order of authorization may issue. The affidavit in question amply makes the probable cause showing, but fails to meet the separate and distinct requirement of the §2518(1)(c) statement regarding other investigative techniques.

This Court recently interpreted the requirements of §2518(1)(c) and that discussion is particularly helpful in establishing that the affidavit here does not conform with the statutory requirements. In United States v. Steinberg, 525 F.2d 1126 (2nd Cir. 1975), cert. denied ___ U.S. ___, 96 S. Ct. 2167, 48 L.Ed 2d ___, 44 U.S.L.W. 3659 (1976), this court reluctantly sustained the validity of the affidavit there in question, stating:

> Although the affidavit provides little factual basis for concluding that normal investigative techniques had not 'suffice[d] to expose the crime' United States v. Kahn, 415 U.S. 143, 153 n.12, 94 S.Ct. 977, 39 L.Ed 2d 725 (1974), paragraphs (1)(c) and (3)(c) of §2518 are in the disjunctive; and the Government's main reliance is upon the second alternative provided by the statute.
>
> United States v. Steinberg, supra, at 1130.

The lesson of Steinberg is clear: an affidavit need not satisfy all three alternatives, but rather will comply with the statutory requirements of §2518(1)(c) if it

presents a "full and complete statement" of any one alternative. The review of the affidavit, set forth supra, reveals that it does not provide the necessary statement of facts regarding any of the alternatives.

First, the affidavit does not state facts that other investigative procedures had been tried and failed. The affidavit discusses at length rather the success of the Government in obtaining information regarding the alleged conspiracy. If reliance is to be placed on this first alternative, failure of such other techniques attempted must also be shown if the plain meaning of the statute is to be given effect. The Government, however, alleges no failure, but rather presents facts which serve only to recount the success that had been possible without wiretapping.

Second, the Government failed to present facts sufficient to satisfy the second alternative, namely that other investigative procedures reasonably appeared unlikely to succeed. To be sure the affidavit alleges that the defendants used flash paper and that the informants would not testify. But the mere failure of an investigative procedure within the context of an otherwise fruitful investigation does not meet the required showing. To hold otherwise would vitiate the protections which are critical to the constitutionality of the statute. United States v. Kalustian, 529 F.2d 585 (9th Cir. 1976). That the mere failure of

one or two techniques does not suffice to satisfy the second alternative of §2518 (1)(c) is illustrated by a simple example: a Government agent could confront a potential defendant with his suspicions and demand a confession. Assertion of the likely failure of that technique in every criminal investigation would be possible, but should not be allowed to satisfy the requirement that other techniques are reasonably unlikely to succeed. Rather, the critical showing under the second alternative should be that other techniques generally appear unlikely to succeed. The fact that the investigation preceding the application had been so successful contradicts any such assertion.

The Kalustian case cited above underscores the inadequacy of the Government's showing that other techniques were reasonably unlikely to succeed. There, as here, the Government made a showing of probable cause to infer a gambling operation and stated that the informants refused to testify. Also, the Government's agents asserted that to their "knowledge and experience" other techniques would not work. The Kalustian court, however, held that the statements above do not meet the statutory standard:

> The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the

> Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view.
>
> United States v. Kalustian, supra, at 589. [Emphasis added.]

The present case is indistinguishable -- the affidavit asserts no other facts indicating that alternative investigative techniques would be unsuccessful. Consequently in this regard the present affidavit did not comply with the statutory requirements of §2518(1)(c) and (3)(c).

As stated in Kalustian:

> A judge reviewing a wiretap application is handicapped without such a showing. Title III and the individual's right to privacy, which it seeks to preserve, demand no less than a full and complete statement of underlying circumstances.
>
> Mere conclusions by the affiant are insufficient to justify a search warrant, Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) or a wiretap order. More specifically, they do not provide facts from which a detached judge or magistrate can determine whether other alternative investigative procedures exist as a viable alternative.
>
> United States v. Kalustian, supra, at 589.

In the context of an otherwise successful investigation, the simple assertion that an alternate technique was unsuccessful does not provide facts sufficient under §2518(1)(c) and (3)(c).

Finally, to satisfy its obligation under 18 U.S.C. §2518(1)(c), the Government might have set forth facts establishing that other investigative techniques have proven to be too dangerous. No indication of danger whatsoever was made, and the records of the defendants do not support any implication that such was the case. The police records of Defendants Valeriano, Furman, and Gunn are devoid of arrests for violence of any sort he sole fact that Defendant Brown was arrested for aggravated assault over eight years ago does not meet the Government's obligation to present facts in support of the assertion that investigative techniques other than wiretapping would have been too dangerous.

The foregoing analysis strongly suggests that the Government's affidavit was defective in neglecting to set forth facts in support of any of the three alternative showings available to the Government. Aside from the information already discussed, the Government, through Special Agent Connolly, presents the following statement:

> 3(c). Normal investigative techniques such as physical surveillance and examination of the records obtainable regarding DANIEL VALERIANO has failed to gather sufficient evidence and offers little probability of securing sufficient evidence to sustain prosecution for violation of the offenses and reasonably appear unlikely to succeed. Therefore, the interception of these telephone communications is the only available

> method of investigation which has a reasonable likelihood of securing the evidence necessary to provide violations of Title 18, United States Code, Sections 1955 and 371. (App. 16)

The above statement is conclusory and provides no facts from which a judge could make the §2518(3)(c) determination that normal procedures [1] have been tried and failed, [2] reasonably appear unlikely to succeed, or [3] appear to be too dangerous.

The statute does not limit wiretaps to be used only as a last resort, United States v. Falcone, 364 F.Supp. 877 (D.N.J. 1973), but it requires that the affidavit provide facts, not conclusions or assertions, for the judge passing on the application.

> The purpose of the exhaustion requirement is not to foreclose the use of electronic surveillance until the state has exhausted every possible means of obtaining a viable case against the subjects, but merely to inform the authorizing magistrate or judge of the nature and progress of the investigation and the difficulties inherent in the use of normal techniques.
>
> United States v. Lanza, 356 F.Supp. 37, 30 (M.D.Fla. 1973).

More is required than a boilerplate recitation such as that contained in Special Agent Connolly's affidavit, United States v. Kerrigan, 514 F.2d 35 (9th Cir. 1975); the affidavit must contain facts that pertain to why normal investigative procedures are not being used. United States v.

Curreri, 388 F.Supp. 607, 621 (D.Md. 1974) citing United States v. Bobo, 477 F.2d 974, 981 (4th Cir. 1973). In the affidavit here, the many facts alleged do not go to the required showing and the assertion of necessity is not supported by the facts. The statute requires more; it requires a connection between the facts alleged and the assertion that a wiretap is necessary.

The Government might assert that it has met its obligation under §2518(1)(c) because it has set forth facts sufficient to establish that a gambling conspiracy existed, which in turn would justify use of a wiretap. This position is untenable. First, it confuses the probable cause requirements of §2518(1)(b) and §2518(3)(b) with the full and complete statement requirement of §2518(1)(c) and §2518(3)(c). More importantly, it would completely vitiate the crucial safeguards incorporated into the statute. This point was well stated in United States v. Kerrigan, 514 F.2d 35, 38 (9th Cir. 1975):

> We agree with appellants that the boilerplate recitation of the difficulties of gathering usable evidence in bookmaking prosecutions is not a sufficient basis for granting a wiretap order. To hold otherwise would make §2518(1)(c) and (3)(c) mere formalities in bookmaking cases.

The court held that other facts presented, including three

months of surveillance, justified the order, but their concern that facts, not conclusions, be set forth is instructive.

Special Agent Connolly states that "the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary...," (App. 16) but in the absence of any of the three distinct showings that are required under §2518(1)(c), that bald assertion appears to deal more with the difficulties of gambling investigations in general. Specific facts, not generalities, are required in support of a wiretap application. In Kalustian, supra, at 589 the Ninth Circuit held that statements of generalities such as contained in the affidavit in question do not suffice to justify a wiretap:

> The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny.

Without specific statements satisfying §2518(1)(c), a key protection in wiretap applications is gone, and, since it was defective in this regard, the application in this case should not have been granted.

The result of the failure to comply with the statutory requirement is that the intercepted communication must be suppressed. Ruling that a failure to follow a different statutory procedure required suppression of an intercepted communication, the Supreme Court in United States v.

Giordano, 416 U.S. 505 (1974) stated:

> The words "unlawfully intercepted" are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.
>
> United States v. Giordano, supra, at 527.

It is well established that the requirements of §2518(1)(c) and (3)(c) play a "central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored." United States v. Giordano, 416 U.S. at 528. The necessity of suppression for failure to comply with the requirements of §2518(1)(c) and (3)(c) was the direct holding of both Kalustian, supra and United States v. Curreri, 388 F.Supp. 607 (D.Md. 1974). In addition, no court upholding the validity of the §2518(1)(c) and (3)(c) showings has ruled that a complying affidavit was not a central safeguard, the absence of which did not require suppression. Earlier in Giordano, the Court stated:

> Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the cir-

> cumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.
>
> United States v. Giordano, supra, at 515.

It goes without saying that, if the purpose of Title III was to ensure restraint, then the negation of normal investigative techniques would and does play a "central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored."

III. THE INTERCEPTED COMMUNICATIONS SHOULD BE SUPPRESSED BECAUSE DEFENDANT KINSLER DID NOT RECEIVE INVENTORY NOTICE REQUIRED BY 18 U.S.C. §2518 (8) (d).

In this case the defendant was not named in the wiretap application or order. Nor, upon disclosure of the relevant documents by the Government, was his identity made known to the presiding judge during or after the wiretap surveillance. There was no service of notice upon this defendant pursuant to 18 U.S.C. §2518(8)(d). It appears from the record that this defendant's identity was never made known to the presiding judge although he ordered service of notice upon the persons named in the application and order.

Nor does it appear from the record, as provided by the Government, that the judge was advised that this defendant was subject to indictment.

In United States v. Rizzo, 492 F.2d 443, 447, (2nd Cir.), cert. denied, 417 U.S. 944, 94 S.Ct. 3069, 41 L.Ed. 2d 665 (1974), this Court ruled that suppression of wiretap evidence for failure to comply with §2518(8)(d) was not required absent a showing of actual prejudice to the defendants. As this Court recognized in United States v. Principie, 531 F.2d 1132 (2nd Cir. 1976), the decisions of the United States Supreme Court in United States v. Giordano, 416 U.S. 505 (1974) and United States v. Chavez, 416 U.S. 562 (1974) may well undercut that holding. Both the Sixth Circuit in United States v. Donovan, 513 F.2d 337 (6th Cir. 1975), cert. granted ____ U.S. ____, 96 S. Ct. 1100, 47 L.Ed2d 310, 44 U.S.L.W. 3462 (1976), argument heard October 31, 1976, 20 CrL 4043, and the Fourth Circuit in United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975), pet. for cert. filed, 43 U.S.L.W. 3637 (U.S. May 27, 1975) have ruled that suppression is required for failure to comply with the notice requirements of §2518(8)(d). It is respectfully urged that these recent interpretations of §2518(8)(d) in light of Giordano and Chavez establish that the inventory notice requirement is a central safeguard, the absence of which requires suppression.

The crucial importance of the notice requirements of §2518(8)(d) in light of Giordano and Chavez was thoroughly explored by the Ninth Circuit in United States v. Chun, 503 F.2d 533 (9th Cir. 1974). The trial court had ordered suppression of the wiretaps on the basis that the defendant, prior to indictment, had not been served with notice of the wire-tap surveillance. The trial judge indicated that had he known defendants might be subject to indictment, he would have ordered notice to be served on them. The Government's failure to bring defendant's existence to his attention, he said, precluded him from properly exercising his discretion under the statute. Persuaded that the mere passage of time had prejudiced defendants' ability to defend themselves, and relying on United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972), he suppressed the communications.

Remanding the case for further consideration in light of United States v. Giordano, 416 U.S. 505 and United States v. Chavez, 416 U.S. 562, the Ninth Circuit observed

> A careful reading of Title III reveals that Congress did not attempt to develop an inflexible set of rules specifically designed to afford protection to those who, although not named in an application or order, have their conversations overheard as a result of a properly authorized wiretap. Although such individuals are subject 'to search', the protection they receive is, for the most part, derived from that which has been provided for those named in the application or order. The potential inadequacy of this derivative protection comes to the fore in the area of

> inventory notices. The unnamed, but overheard, are entitled to such notice only to the extent the issuing judge in his discretion determines that the interest of justice so requires.
>
> United States v. Chun, supra, at 536.

The appellate court, in establishing guidelines for the trial court on remand, indicated two areas of inquiry - one constitutional and the other statutory, violations of either which could result in suppression of the communications.

On the constitutional issue, the court reviewed the holdings in Berger v. New York, 388 U.S. 41 (1967) and Katz v. United States, 389 U.S. 347, (1967) both relied upon extensively by Congress in enacting Title III, and is clear that post-use notice under 18 U.S.C. §2518(8)(d) was to serve as compensation for the lack of any traditional prior notice. And it is clear that the unnamed but overheard are also entitled to Fourth Amendment protection of notice. Formulating the test for constitutionality as to the unnamed but overheard under 18 U.S.C. §2518(8)(d) the appellate court stated:

> Specifically, we believe that when the government intends to use the contents of an interception, or evidence derived therefrom, to obtain an indictment against an unnamed but overheard individual, such individual must be given notice promptly after the decision to obtain an indictment has been made. At a minimum, this notice must include all the information which is contained in a subparagraph (8)(d) inventory notice.
>
> United States v. Chun, supra, at 537.

In the instant case, defendant Kinsler has never been served with a §2518(8)(d) notice so that, in this case, the definition of "promptly" does not come into play.

On the statutory level, admitting no previous statutory or decisional law help, the Ninth Circuit imposed the following duty upon the prosecutor in wiretap cases:

> To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted communication is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although the judicial officer has the duty to cause the filing of the inventory, it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications...
>
> The failure of the government to provide the judge with even a general description of the appellees in the present case was thus sufficient to constitute a violation of 2518(8)(d).
>
> United States v. Chun, supra, at 540.

On both levels, defendant respectfully suggests violations mandating a suppression. Lack of notice, even subsequent to the tap, subverts the Fourth Amendment so as to constitute a general warrant and failure to give notice fails to implement the Congressional intention to limit this extraordinary investigative device.

The exact circumstances of the Government's failure

ever to provide defendant Kinsler with inventory notice shows that suppression in this case would be consistent with Rizzo, where the violation was late notice, not complete failure to give notice, and the concern evinced by this Court in Principie. A very recent decision by this Court in United States v. Schwartz, 535 F.2d 161 (2nd Cir. 1976) bolsters this conclusion. In Schwartz this Court ruled that the requirements of §2518(8)(d) were met because the judge had been given the defendant's name by the Government and, in his discretion had decided that the defendant would not receive notice. The failure of the Government in the instant case to give the presiding judge any information at all regarding defendant Kinsler provides a ready distinction. In failing to allow the presiding judge an opportunity to exercise his discretion under §2518(8)(d), the Government denied the defendant a safeguard that is guaranteed him under the statute. Section 2518(8)(d) sets forth a procedure whereby the judge, not the Government, makes the crucial determination as to who shall receive post-termination notice and inventory.

In Principie, this Court cites United States v. Bohn, 508 F.2d 1145 (8th Cir.) cert. denied 421 U.S. 947 (1975) for the proposition that, in the Eighth Circuit, absent prejudice, noncompliance with §2518 does not warrant sup-

pression. The recent case of United States v. Civella, 533 F.2d 1396 (8th Cir. 1976), however, is very helpful in illustrating that the Eighth Circuit, too, recognizes that the total denial of notice required by §2518(8)(d), as is the case here, presents so egregious a failure to comply with the statutory mandate that suppression is required. In Civella the Eighth Circuit ruled that a five day delay past the ninety day period set forth in the statute did not require suppression. As to two defendants however, there had been no effort made at all to comply with the §2518(8)(d) requirements -- a situation identical to that before this Court with defendant Kinsler. Here the Eighth Circuit drew the line and ruled that suppression as to these defendants would be required, stating:

> And it would be stretching things too far to say that the fact that they received full information about the interceptions after they were indicted in the fall of 1971 amounted to a substantial compliance with the statute. The wiretap evidence should have been suppressed as to them.
>
> United States v. Civella, supra, at 1406.

It is respectfully submitted that whether this Court chooses to agree with the Sixth and Fourth Circuits that prejudice need not be shown or chooses to maintain the position taken in Rizzo and by the Eighth Circuit, the total lack of any inventory notice whatsoever requires that the wiretap evidence be suppressed as to defendant Kinsler.

IV. CONCLUSION

The Government has failed in this case in two critical respects to follow the necessary statutory procedure. By neglecting to provide a "full and complete statement" as to other investigative techniques, it made compliance with §2518(3)(c) impossible. No facts were set forth that could justify a finding by the presiding judge that either 1) other procedures had been tried and had failed or 2) other procedures reasonably appeared unlikely to succeed or 3) other procedures would have been too dangerous. Without a finding complying with §2518(3)(c), the application failed to conform to a central safeguard and therefore the resulting interceptions should have been suppressed. In addition, or alternatively, the Government's failure to provide the defendant with a notice of interception or to inform the ordering Court of defendant's exposure to indictment requires that suppression of the interceptions involving this defendant.

Wherefore, the defendant Kinsler respectfully requests that the judgment be reversed and the matter be remanded

to the District Court with an order to dismiss the indictment.

THE DEFENDANT

Frank Kinsler

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549-4770

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DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the defendant's brief and appendix was mailed postage prepaid this 18th day of November, 1976, to the Office of the U.S. Attorney, Federal Building, 450 Main Street, Hartford, Connecticut 06103.

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